

CHAPTER 5.0

PROGRAMMATIC AGREEMENT GOVERNING HISTORIC REVIEW

5.1 OVERVIEW

As discussed in the Draft SEIS, SEA determined early in the environmental review process that DM&E's Powder River Basin Expansion Project had the potential, in certain locations, to result in significant adverse impacts to cultural resources. In both the Draft EIS issued in September of 2000 and the Final EIS issued in November of 2001, SEA disclosed that the project area—which encompasses DM&E's existing rail line in Minnesota and eastern and central South Dakota and the proposed new rail alignment in western South Dakota and eastern Wyoming—is likely to contain undisturbed cultural resources. SEA recognized that activities such as earthmoving to construct new rail right-of-way, construct sidings, or repair the existing rail bed would likely place cultural resources at risk. SEA further acknowledged that this potential damage to archaeological sites and historic resources would be a significant impact.¹

As also discussed in the Draft SEIS,² SEA thoroughly evaluated and assessed the potential impacts to cultural resources associated with the proposed rail line construction and rehabilitation during the EIS process. In consultation with the Advisory Council on Historic Preservation (ACHP), SEA determined that a Programmatic Agreement developed pursuant to the ACHP regulations at 36 CFR 800.14(b)(1) would provide the best means of recording the terms and conditions agreed upon by the required signatories to resolve the potential adverse effects of the PRB Expansion Project to historic properties, and began work on a Programmatic Agreement to comply with Section 106 of the National Historic Preservation Act, 16 U.S.C. 470f.

¹ Draft EIS, at pages 4.3-104 and 4.4-134 to 4.4-135.

² Id. at pages 5-1 to 5-4.

SEA made the Programmatic Agreement publicly available by including it in the Draft EIS and specifically requesting the public's review and comment on the document. SEA received comments, which it incorporated into a Final Programmatic Agreement set forth in the Final EIS. When the Board issued the 2002 Decision approving DM&E's proposal, SEA was still in the process of negotiating with the various signatories and consulting parties about proposed modifications and did not have an executed (signed) Programmatic Agreement. SEA eventually secured all the necessary signatures, however, and on May 14, 2003, ACHP signed the Programmatic Agreement. With the signature of the ACHP (which followed the signatures of the Chief of SEA, the five cooperating agencies, the three State Historic Preservation Officers, and DM&E), the Programmatic Agreement took effect. ACHP indicated to SEA that this constituted a "satisfactory resolution."³

On judicial review of the Board's 2002 Decision in Mid States, the court affirmed SEA's Section 106 consultation process, finding that the Board had complied with its responsibilities to notify and solicit public comment on matters of historic preservation during the environmental review.⁴ However, the court found that the Board had been premature in authorizing DM&E to construct its proposed rail line in the 2002 Decision before obtaining consensus on the terms of the Programmatic Agreement.⁵ Prior to oral argument before the court in Mid States on June 11, 2003, the Board submitted a letter to the court informing it that SEA had successfully executed the Programmatic Agreement on May 14, 2003. The court upheld SEA's approach but did not take note of the signed Programmatic Agreement.

³ Id. at Appendix D.

⁴ 345 F. 3d at 554.

⁵ Id. at 555.

In Mid States, the court determined that the Programmatic Agreement should have been executed before issuance of a license. In the Draft SEIS, SEA explained that, by securing an executed Programmatic Agreement, it had addressed the concerns of the court.

5.2 COMMENTS AND SEA’S RESPONSE

SEA received four comments on its development of a Programmatic Agreement governing cultural resources. These comments were received from the Shakopee Mdewakanton Sioux Community, the South Dakota Chapter of Sierra Club, Defenders of the Black Hills (a Native American organization), and one individual. The Shakopee Mdewakanton Sioux Community expressed general concern regarding disturbances of areas of potential historic significance, particularly those areas that may contain objects of Dakota culture, history, or religion. The Shakopee Mdewakanton Sioux Community asked SEA to keep them informed of the progress on the project. SEA responded by sending requested information to the Shakopee Mdewakanton Sioux Community and will keep this Tribe (as well as 32 other interested Tribes) informed, and invited to participate in the ongoing Tribal consultation process, should the Board again approve the PRB Expansion Project and should DM&E move forward with construction.

The remaining issues regarding the Programmatic Agreement raised by the three other commenters encompass topics beyond the scope of the Mid States remand. Specifically, these commenters question SEA’s Tribal consultation efforts, noting that some Tribes from the project area (Minnesota, South Dakota, and Wyoming) had not signed the Programmatic Agreement. The commenters further argue that the Tribes listed in the Programmatic Agreement as invited signatories were not involved in the development of the Programmatic Agreement; that SEA had not properly addressed the “Fort Laramie Treaty” issues; and that the Programmatic Agreement would not adequately protect or preserve cultural resources. Each of

these assertions were either decided in the Board's favor in Mid States, and therefore, were not remanded to the agency for further consideration,⁶ or were not raised before the court and are administratively final. Therefore, SEA thanks these commenters for participating in the SEIS process, but will not respond in detail to these comments in this Final SEIS.

Like the other issues described above, the adequacy of SEA's Government-to-Government Tribal consultation process is not one of the matters that was remanded to the agency. But SEA believes that the work conducted cooperatively among the Tribes, SEA, and the other signatories to the Programmatic Agreement in this case is of such importance that it will summarize that process below.

5.3 GOVERNMENT-TO-GOVERNMENT TRIBAL CONSULTATION PROCESS

Throughout the EIS process, SEA conducted extensive Tribal consultation and had the opportunity to work cooperatively with several Tribal organizations, as summarized in the Draft EIS, Appendix I, Attachment 1: Tribal Consultation Summary. Starting with letters to the Tribal Chairmen of 33 Tribes and 4 Tribal organizations in September of 1998, SEA contacted and met with Tribal representatives throughout the preparation of the EIS, including a 3-day meeting with the Tribes at the Rosebud Sioux Reservation in November, 2000, to provide the opportunity for the Tribes to comment on the Draft EIS, Programmatic Agreement, and any other aspects of the proposed project.

⁶ Petitioners unsuccessfully argued many of these same points during judicial review of the 2002 Decision in Mid States. For example, in Mid States, the court specifically rejected these arguments and upheld the Board's authority to authorize construction and operation of the proposed project across lands formerly subject to the conditions of the 1851 and 1868 Treaties. Mid States, 345 F.3d at 555.

During preparation of the EIS and the Programmatic Agreement, SEA and the cooperating agencies attended two Inter-Tribal meetings, one in Williston, North Dakota (May 1999) and one in Rapid City, South Dakota (July 1999). These meetings were scheduled for the express purpose of reviewing the Programmatic Agreement with the Tribes, discussing their concerns, and making appropriate revisions to the Programmatic Agreement. Additionally, SEA participated in 20 other informal meetings with Tribal chairmen, Tribal Historic Preservation Officers, and other Tribal representatives to discuss the proposed project and any Tribal issues related to the project or the Programmatic Agreement. Draft copies of the Programmatic Agreement were circulated to the 33 Tribes identified as interested parties for their review and comment on two separate occasions. Additionally, the Tribes were provided copies of the EIS and had the opportunity to provide comments on the Programmatic Agreement during the comment period on the Draft EIS.

Two Tribes signed the Programmatic Agreement: the Pawnee Nation of Oklahoma and the Winnebago Tribe. Following the release of the Draft SEIS, the Lower Brule Sioux Tribe, a local Tribe located south of Pierre, South Dakota, also signed the Programmatic Agreement.⁷ While SEA does not know why a number of local Tribes have chosen (at least to-date) not to sign the Programmatic Agreement, these signatures are not required to execute and implement a valid Programmatic Agreement. Nevertheless, SEA welcomes the involvement of the Tribes in the historic review process at any time and is confident that the Programmatic Agreement will ensure appropriate and respectful treatment of Tribal remains, artifacts, and other concerns, should the Board approve and DM&E construct the PRB Expansion Project.

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⁷ A copy of the signature page of the Programmatic Agreement containing the signature of the Lower Brule Sioux Tribe is included in Appendix C.